A specific performance by the receiver, would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lienholders, and neither can thus be diverted:" *Express Co* v. *Railroad Co.*, 99 U. S. 191; and see *Commonwealth* v. *Franklin Ins. Co.*, 115 Mass. 278. In any case, where judgment is rendered against a receiver, it must be so entered as to be enforceable only against the funds which are or ought to be in his hands: *Commonwealth* v. *Runk*, 26 Penn. St. 235.

As to the responsibility of the receiver in respect to his own conduct, he is governed by the same general rules which apply to most classes of trustees. Thus it is his duty to keep the trust fund entirely separate and distinct from his own money; and if he deposits it in a bank in his own name, or loans it out, even temporarily, or mixes it with his own funds and uses them together, or employs the trust fund in trade, it is a breach of trust, and he will be chargeable with interest: *Utica Ins. Co.* v. *Lynch*, 11 Paige Ch. 520. And if he wilfully and corruptly exceeds the powers conferred upon him by the court, he is liable for the actual damage sustained by reason of such misconduct: *Stanton* v. *Alabama, &c., Rd.*, 2 Woods 506. And where one of two receivers misappropriates the funds, and the other is grossly negligent, giving no attention to the duties of the trust, they will be jointly liable for the balance found due, and will be chargeable with interest: *Commonwealth* v. *Ins. Co.*, 14 Allen 344.

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT ENGLISH DECISIONS.

High Court of Justice, Queen's Bench Division.

APPLEBY v. FRANKLIN.

The rule of law that a person who has been injured by a felony is not allowed to bring an action upon it for damages until he has instituted criminal proceedings, only applies between parties injured and injuring, and not where the plaintiff has been indirectly injured in the loss of his servant or daughter's services.

THIS was an action for loss of service by seduction.

The statement of claim alleged, in the 1st paragraph, that the defendant had seduced the plaintiff's daughter and servant, and in

the 2d paragraph, that the defendant had administered noxious drugs to the plaintiff's said daughter for the purpose of procuring abortion, whereby she has been made ill and incapacitated for service.

The defendant took out a summons before Master FRANCIS, to strike out paragraph 2, on the ground that it disclosed a felony for which there had been no prosecution, and that, therefore, no cause of action arose upon it. The Master struck out the paragraph, and the plaintiff appealed to STEPHEN, J., in chambers, who referred the question to the Divisional Court.

H. Terrell, for the plaintiff.

A defendant cannot demur to a statement of claim on the ground that it shows the cause of action to amount to a felony: *Roope* v. *D'Avigdor*, 20 Q. B. D. 412. Nor can the objection be taken by plea: *Osborn* v. *Gillett*, L. R., 8 Ex. 88. The objection, if it is maintainable, can only be taken by the attorney-general. It is difficult to trace the origin of the doctrine that a civil right is merged in a felony. The whole question was fully discussed in the case of *Wells* v. *Abrahams*, L. R., 7 Q. B. 554. That was a case of trover and trespass for a brooch, and it was there held that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. BLACKBURN, J., in his judgment, refers to the case of *Markham* v. *Cobb*, Sir W. Jones 147, as the origin of all the dicta in the books upon the subject. This case is distinguishable from *Wellock* v. *Constantine*, 2 H. & C. 146. In that case the action was brought by a woman for an assault amounting to a rape, and it was held to be not maintainable until after the defendant was prosecuted, because it was her duty to prosecute, and because, if the plaintiff had consented, she could not maintain the action for assault at all. In the case of *Ex parte Ball, In re Shepard*, 10 Ch. D. 667; BRAMWELL, L. J., throws considerable doubt upon the value of that case as an authority.

L. G. Pike, for the defendant.

A general duty is cast upon the plaintiff in this case to prosecute: *Osborn* v. *Gillett*, Ord. 18, R. 1, is discretionary, and the court will not interfere with the discretion of the Master when properly exercised.

HUDDLESTON, B.—The Master in this case, has struck out the 2d paragraph of the statement of claim, and my brother STEPHEN has

referred the matter to us. The statement of claim was made by a mother alleging that the defendant had seduced her daughter. In the 2d paragraph it was stated that the defendant had further injured her daughter by administering drugs to her for the purpose of procuring abortion. It was said that the Master was right, because paragraph 2 disclosed a felony which could not be actionable until prosecuted. Mr. *Terrell* says the objection cannot be taken by demurrer nor by plea: *Roope* v. *D'Avigdor*. However, it seems clear from the case of *Wells* v. *Abraham*, that there may be a power to strike it out, and there is strong authority to show that a party injured cannot maintain an action against the party injuring him: *Wellock* v. *Constantine*. In that case WILLES, J., nonsuited the plaintiff, on the ground that she was the party injured. This was noticed in the case of *Ex parte Ball, In re Shepard*, although some doubt was suggested whether *Wellock* v. *Constantine* was an authority; at all events, BRAMWELL and BAGGALAY, L.JJ., decided in favor of the plaintiff, on the ground that the duty to prosecute, if any, was not in him; therefore, when a person who is himself or herself injured, takes civil proceedings for the injury, no action will lie until there has been a prosecution in a criminal court. This rule does not apply when the party suing is not the party injured. A master or father who sues for loss of service, can maintain the action even if a felony is committed. In the case of *Osborn* v. *Gillett*, it was held that the master could not maintain an action for the loss of his daughter and servant, who had been immediately killed; but the 4th plea, that the act amounted to a felony, and that the person committing it had not been prosecuted, was held bad. The argument of *Graham* in that case quoted *White* v. *Spettigue*, 13 M. & W. 603, as establishing that the rule as to a right of action being suspended by felony, was not applicable except between the party injured and the criminal: *White* v. *Spettigue* is in point. In this state of things we are bound by *Osborne* v. *Gillett*, and the Master was wrong in striking out the 2d paragraph. It would be a scandalous failure if the defendant could not be made amenable to damages in such a case. The appeal must be allowed with costs.

WILLES, J.—I am of the same opinion, and the authorities leave no room for doubt. A person injured cannot bring an action for a cause which amounts to a felony until he has prosecuted the felon. Such a claim is not demurrable, nor can it be objected to by plea

because, if either of these were allowed, it would extinguish the cause of action. Whether the cause could be suspended or withdrawn until the condition was fulfilled or not, is another matter, but no better course could, in my opinion, be adopted than striking out that which is wrongly put in. This, however, could only be done against a person who is under an obligation to prosecute, and that is not the case here: *Osborne* v. *Gillett*, is strictly in point.

The English rule that a party directly injured by an act amounting to a felony in the defendant, could not maintain a civil action for damages merely, was supposed to rest on several grounds. One was that by the felony all the defendant's lands and goods were forfeited to the crown, and so it was useless for the plaintiff to sue, since a judgment could bring him no satisfaction. Another was, the action was said to be merged in the felony, in the same manner as a note is merged in a judgment upon it. But probably the true ground was, not that the civil remedy was merged in the felony, and so forever gone, but that from principles of public policy, the courts would not sustain private actions in such cases until the party injured had done all in his power to bring the offender to public justice; it being at that time, as is well known, no person's *official* duty to prosecute for crime, and some stimulus was necessary to induce the injured party to carry on a criminal prosecution in order to clear the way for his private redress: see *Crosby* v. *Leng*, 12 East 413. If therefore, he had discharged that duty, and the guilty party had been convicted of the felony, the civil action could go on: *Markham* v. *Cobb*, Noy 82; *Dawkes* v. *Coveneigh*, Style 346; *Grafton Bank* v. *Flanders*, 4 N. H. 243. And this was so, even though the accused had been *acquitted* of the felony; the owner might then bring his civil action, since his public duty had been discharged, unless indeed he had aided in procuring the acquittal: *Crosby* v. *Leng*, 12 East 409; *Smith* v. *Weaver*, 1 Taylor 58; *Morgan* v. *Rhodes*, 1 Stew. 70.

The hardship of first requiring a criminal prosecution before a private action could be maintained, was never more forcibly illustrated than in the late English case of *Wellock* v. *Constantine*, 2 H. & C. 146 (1863), in which a young woman was not allowed to maintain an action for a felonious assault upon her, by which her life was endangered, until she had publicly prosecuted the offender criminally; and as that could be done only at her own private expense, this was a simple and gross denial of justice. A much better rule had been adopted in this country several years before in *Koenig* v. *Nott*, 3 Hilton 323 (1859). This old common-law rule has been sometimes adopted in America in all its rigor: *Foster* v. *Tucker*, 3 Greenl. 458; *Boody* v. *Keating*, 4 Id. 164; *Crowell* v. *Merrick*, 19 Me. 392; *Belknap* v. *Milliken*, 23 Id. 381. This was subsequently changed by statute in Maine, so far as it related to *stolen property*, but apparently no further.

The English rule was also adopted in Alabama: *McGrew* v. *Cato*, Minor 8; *Middleton* v. *Holmes*, 3 Port. 424; *Blackburn* v. *Minter*, 22 Ala. 613; *Martin* v. *Martin*, 25 Id. 201; *Nelson* v. *Bondurant*, 26 Id. 341; *Bell* v. *Toy*, 35 Id. 184. So in Georgia: *Adams* v. *Barrett*, 5 Ga. 404; *Neal* v. *Farmer*, 9 Id. 555; *McBain* v. *Smith*, 13 Id. 315. So in New Brunswick: *Pease* v. *McAloon*, 1 Kerr 111.

Pennsylvania seems to have indirectly recognised this doctrine; for notwithstanding its disapprobation in *Piscataqua Bank* v. *Turnley*, 1 Miles 312 (1836), in the District Court of Philadelphia; yet in a

subsequent case before the Supreme Court, *Hutchinson* v. *Bank of Wheeling*, 41 Penn. St. 42 (1861), it was held, that the right of action for articles stolen in 1850, was suspended from March 1852 to September 1852, while a criminal prosecution was pending against the thief; so that a civil action commenced in August 1858, more than six years after the taking, was not barred by the statutes of limitations. A directly contrary result was reached in *Howk* v. *Minnick*, 19 Ohio St. 462 (1869).

On the other hand, considering that in this country there is no general forfeiture of lands or goods, for the commission of a felony (except treason); considering that every state has an official public prosecutor of crime; considering that no stimulus of that kind is now necessary; the prevailing doctrine here is that the English rule does not apply, and the civil remedy may proceed, whether the offender has or has not been publicly prosecuted, or any steps taken by the injured party to bring him to justice.

The earliest dissent in Massachusetts from the common-law rule seems to have been in the case of *Boardman* v. *Gore*, 15 Mass. 331, decided in 1819, which did not however call for a direct decision on the point, since in that case the defendant made a note payable to one Cushing, and then forged the name of Cushing as endorser, and passed it to the plaintiff, who discounted it, and he was allowed to recover the amount thus loaned to the defendant as money had and received, notwithstanding the forgery. See also *Ocean Ins. Co.* v. *Fields*, 2 Story 74.

But the question directly arose again in *Boston & Worcester Rd. Co.* v. *Dana*, 1 Gray 83 (1854), in which the suit was against the agent of the company, for money which he had stolen from the drawers of the ticket clerks in their depot in Boston, and notwithstanding an earlier nisi prius decision of SEWALL, C. J., to the contrary, the English rule was entirely repudiated in a very able opinion by BIGELOW, J., too long to be quoted here.

It was cited and approved in the subsequent case of *Atwood* v. *Fisk*, 101 Mass. 365 (1869), in which it was said a wrongdoer was not entitled to any special privilege, because his tort also amounted to a crime.

Perhaps the earliest recorded disapprobation of the English rule, to be found in our reports is in the case of *Cross* v. *Guthery*, 2 Root 90 (1794), which was an action by a husband against a surgeon for negligently causing his wife's death, by malpractice, the court somewhat erroneously saying, "the rule is applicable in England only to capital crimes." However, the Supreme Court of New Jersey in a nisi prius case had some time before refused to apply the English rule to a civil action for fraud in passing to the plaintiff certain forged certificates: *Patton* v. *Freeman*, 1 Coxe 113 (1791).

In 1812, by a divided court of three to two, the Constitutional Court of South Carolina decided that a civil action by a master for enticing away a negro slave (made a capital felony by statute) could be maintained, as the civil action could not be merged in the felony, and the question of a felony "ought not to be tried in such a collateral way:" *Robinson* v. *Culp*, 1 Const. Rep. by Treadway 231; 3 Brev. 302. And this was followed in the Court of Appeals: *Cannon* v. *Burris*, 1 Hill 372 (1833), which was trespass for feloniously killing the plaintiff's cow. Missouri also disapproved of the doctrine in *Nash* v. *Primm*, 1 Mo. 125 (1822); *Mann* v. *Trabue*, Id. 709 (1827).

One of the best considered cases on this side of the question, is that of *White* v. *Fort*, 3 Hawks 251 (1824), North Carolina, which was a civil action for burning the plaintiff's house and barn, in which the defendant had been complained of before the grand jury and *no bill found*. The real question was whe-

ther a conviction or acquittal by a petit jury was a condition precedent to the maintenance of the civil remedy; but the doctrine of the case goes to the whole extent of denying the existence of the English rule in this country, under any circumstances. Judge WARE in 1825, declared no such rule obtained in this country, and forcibly stated the reasons why, in *Plummer* v. *Webb*, 1 Ware 71.

In *Allison* v. *Bank*, 6 Rand. 223 (1828), Judge GREEN of the Court of Appeals of Virginia, in a very elaborate opinion, declared against the doctrine, saying among other things, "There is not a single adjudged case reported to this day, in which a civil action founded on a wrong amounting to a felony has been adjudged not to lie." As this was several years after *Foster* v. *Tucker*, 3 Greenl. 460 (1824), and *Boody* v. *Keating*, 4 Id. 164 (1826), this remark of Judge GREEN'S was not strictly correct.

In 1833, the question arose in *Pettingill* v. *Rideout*, 6 N. H. 454; trespass for taking the plaintiff's horse, which had in fact been stolen, RICHARDSON, C. J., said "How a civil remedy can at this day be considered as merged in a felony counsel has made no attempt to explain, nor does it seem to us to admit of any explanation. To call a suspension of the civil remedy, until the criminal justice of the state is satisfied, a merger is in our opinion very little, if any, short of an abuse of language." The same judge had previously expressed the opinion that at all events, the civil remedy could be suspended only until after the trial of the alleged offender: *Grafton Bank* v. *Flanders*, 4 N. H. 239 (1827). The Supreme Court of Tennessee, in *Ballew* v. *Alexander*, 6 Humph. 433 (1846) citing and approving *Boardman* v. *Gore*, 15 Mass. 337, declined to sustain a plea of felony as a defence for an aggravated assault and battery upon the plaintiff.

In *Mitchell* v. *Mims*, 8 Tex. 6 (1852), the Supreme Court were inclined to think that the better opinion is that the doctrine is not applicable in this country.

In *Newell* v. *Cowan*, 30 Miss. 492 (1855), it was declared that the rule, together with the reason on which it was founded, "has long since been exploded."

Lofton v. *Vogles*, 17 Ind. 106 (1861), declared no such rule prevailed in the "United States." And Michigan, in 1867, was of the same opinion: *Hyatt* v. *Adams*, 16 Mich. 189.

In Arkansas and perhaps elsewhere, the English rule is expressly repealed by statute: *Brunson* v. *Martin*, 17 Ark. 277.

The conclusions to which the foregoing review leads us are, that in this country with a few exceptions:

1st. A private injury is not "merged" in a felony, so that the right of recovery is forever gone, even though the criminal has been convicted and punished.

2d. That it is not necessary that a criminal trial should be had before a civil suit can be commenced.

3d. That if the private action is first commenced, it will not be suspended or continued, until after the criminal has been convicted.

4th. That consequently the Statute of Limitations will not be suspended during the pendency of a criminal prosecution.

5th. That in the few states where the contrary doctrine has been more or less recognised, it has never been extended to *misdemeanors*, but is strictly confined to felonies: 4 Ohio 376; 6 B. Monroe 38; 15 Geo. 349; 16 Id. 203.

EDMUND H. BENNETT.

Boston.